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IN THE

Supreme Court of the United States

October Term, 1987

FRANK ATONIO, EUGENE BACLIG, RANDY delFIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case.

The named plaintiffs in this class-action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, respondents Wards Cove Packing Company, Inc., Castle & Cooke, Inc., and Columbia Wards Fisheries charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any

time since March 20, 1971, employed by one of these three employers at one of the five class canneries. *See* Petitioners' Appendix, p. A-347 (defines class).

Following a lengthy non-jury trial, the trial court found that petitioners had not established discrimination under § 1981 or Title VII and judgment was entered for respondents. The Ninth Circuit affirmed this decision, but on rehearing *en banc* resolved a conflict within the circuit by determining that the impact analysis could be applied to subjective employment practices and remanded to the original panel. The subsequent panel decision vacated the judgment and remanded to the district court with directions to apply the disparate impact analysis in a manner inconsistent with decisions of this court and in conflict with other circuits.[1]

B. Material Facts.

Respondents operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Respondents' head office and support facilities are located at Seattle, Washington, and Astoria, Oregon.

The employment needs to operate the canneries will vary with the size and duration of the salmon runs. Respondents hire employees primarily from the Pacific Northwest and Alaska. The bulk of employees are "cannery workers," who work in the cannery itself on the fish processing, canning lines. Local 37 of the I.L.W.U. has jurisdiction and a contract for these jobs. The remaining jobs at the cannery are carpenters, machinists, tender crews, longshoremen, administrative, and other support personnel. It is these non-cannery worker jobs

[1] This decision is the subject of respondents' own Petition for Writ of Certiorari, No. 87-1387 (dated February 9, 1988).

which are at issue. The non-cannery worker jobs are covered by several union contracts. Some are non-union. The trial court's opinion sets forth the facts in detail. (Petitioners' Appendix, p. A-210-305; *see also* the background discussion in first panel opinion at *id.*, p. A-136-169).

Respondents hire all employees except those persons working on the cannery line (cannery workers) from an external labor market which is 10% nonwhite. For the positions at issue, respondents hired 21% nonwhites in the at-issue jobs at their class canneries. Cannery workers, on the other hand, were hired through Local 37 of the I.L.W.U. The composition of Local 37 is dominated by Filipinoes, as are the crews it dispatches to the canneries each summer. In addition, respondents filled some cannery worker jobs for some of the more remote canneries from local populations.

In 1974 petitioners commenced a class action against respondents. The suit mounted a broad-scale attack against the gamut of respondents' employment practices. Petitioners identified 16 "practices" which they contended caused an imbalance and thus a "concentration" of nonwhites in the lower-paying cannery worker jobs. Petitioners used comparative statistics to argue that of the total work force, the majority of the nonwhites were concentrated in the lower-paying jobs and that there should have been a balance of 50% white/nonwhite employees in all job classifications.

After 12 trial days, in which more than 100 witnesses testified, over 900 exhibits were admitted, and over 1,000 statistical tables were submitted, the trial court entered extensive findings of fact in a 73-page opinion. Petitioners' Appendix, p. A-208-347. The findings determined that petitioners' comparative statistics were of little probative value; that the

labor supply for respondents' facilities is 90% white;[2] that minorities were not underrepresented in the at-issue jobs;[3] that cannery workers are not the appropriate comparison labor pool for at-issue jobs; that respondents hire from an external labor supply and do not either promote-from-within or train inexperienced, unskilled workers for at-issue jobs; that most jobs at issue require skill and prior experience that is not readily acquirable at the canneries; that Local 37 provides an oversupply of nonwhite cannery workers and that this overrepresentation is an institutional factor in the industry.

In addition, the trial court found that no individual instances of discrimination were proven; that respondents did not give job preference to friends and relatives; that petitioners' "nepotism" statistics were distorted and unreliable; that hiring was on the basis of job-related criteria; that hiring of experienced personnel was a business necessity; that the rehire preference clauses in the union contracts operated like a seniority system; that housing is not racially segregated, and that housing, rehire, and messing policies were all dictated by business necessity.

The trial court found that petitioners had failed to establish intentional discrimination[4] and the disparate impact

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[2] Thus, it is not surprising that of the 13 individual "job families" evaluated at the individual canneries, several mirrored this racial composition. *See* Petition, p. 2. Many of these job families, however, only hired one or two new people each year.

[3] Petitioners point to three instances in which class members were significantly underrepresented in a job family at a cannery. (They erroneously cite one other.) Petition, p. 4. They fail to point out that in the *sixty-two* other job family evaluations, non-whites were *not* significantly underrepresented.

[4] The trial court was fully aware of and considered petitioners' evidence of "race labeling" (*see* Petition, pp. 2-3), but found it was not persuasive evidence of intent; such terms were "routinely

(footnote continued on next page)

analysis was not appropriate for application to plaintiff's wide-ranging multiple practice challenge nor to subjective hiring practices. In applying the impact analysis individually to five of respondents' practices (rehire preference, English language, "nepotism," housing, and messing), the district court again found in favor of respondents.

C. Court of Appeals Rulings.

On appeal a panel of the Ninth Circuit affirmed the judgment, noting, however, that there was a conflict in the decisions of several circuits and the Ninth Circuit itself as to whether the disparate impact analysis could be applied to analyze "subjective practices." 768 F.2d 1120 (9th Cir. 1985); Petitioners' Appendix, p. A-134 *et seq.* This opinion was withdrawn after rehearing *en banc* was granted. 787 F.2d 462 (9th Cir. 1985); *Id.* p. A-133. On *en banc* rehearing, the Ninth Circuit held that the disparate impact analysis could be applied to such practices. 810 F.2d 477 (9th Cir. 1987); Petitioners' Appendix, p. A-51 *et seq.* The case was then remanded to the original panel which sought to apply the impact analysis to eight of the 16 "practices" identified by petitioners. 827 F.2d 439 (9th Cir. 1987); Petitioners' Appendix, p. A-3 *et seq.*

On remand the Court of Appeals panel affirmed the district court on disparate treatment claims, did not discuss the English language requirement, affirmed the finding that the rehire preference was a business necessity, but held that petitioners' "comparative statistics," which showed only a concentration of minorities in the cannery worker jobs, were nonetheless adequate to require the district court to examine

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used by non-whites." Petitioners' Appendix, p. A-336. Use of the term "Iron Chink" (Petition, p. 3) was not significant because the machine was *patented* under that name at the turn of the century, long before respondents entered the business. The machine has borne that stamped name ever since.

respondents' hiring practices on grounds of business necessity. In doing so, the Court of Appeals did not hold that any practice caused disparate impact, and ignored the district court's findings that petitioners' statistics were distorted and unreliable, that respondents hired more nonwhites than the proportion available in the labor supply, and that institutional factors, not the respondents' practices, caused an overrepresentation of minorities in cannery worker jobs.

The court also held, contrary to trial court findings, that a preference for relatives ("nepotism") existed and had an adverse impact on nonwhites. The court questioned the district court's finding of business necessity for respondents' housing and messing practices. Finally, the court affirmed its earlier decisions dismissing the Title VII claims against Wards Cove Packing Co. and Castle & Cooke as to the Columbia Wards Fisheries canneries. Petitioners' Appendix, p. A-50.[5] Judgment for respondents was vacated and remanded.

REASONS THE WRIT SHOULD BE DENIED

I. The District Court's Resolution of Conflicting Statistical Evidence Was Not Clearly Erroneous and the Ninth Circuit's Affirmation of That Finding as to the Treatment Issue Was Not In Conflict With Decisions of This Court or the Other Courts of Appeals.

Petitioners pursued their claims of hiring discrimination under both the disparate treatment and disparate impact theories. The first question presented by this petition concerns only the disparate treatment theory. After reviewing the statistical and other evidence, the district court found that

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[5] Petitioners had failed to raise this theory in the *first* appeal of the dismissal of these Title VII claims, reported at 703 F.2d 329, 332 (9th Cir. 1982). *See* discussion *infra*, ¶ II.

intentional discrimination was not established under this theory.[6] *See* Petitioners' Appendix, pp. A-323-324; A-337. The Ninth Circuit affirmed. Because the finding of no intentional discrimination was reasonable and firmly supported by the evidence, it was not clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

Petitioners now challenge only the evidentiary finding as to the relative weight of the statistical portion of the disparate treatment evidence. Their statistical arguments are not supported by the decisions cited, but are refuted by decisions of this court and the circuit courts.

A. The District Court's Findings as to the Relative Weight to be Given Conflicting Statistical Evidence Were Not Clearly Erroneous.

The Ninth Circuit held that the "district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry." Appendix, p. A-16-17. It, therefore, reviewed the district court's findings under the clearly erroneous test. *Id.* Petitioners do not argue this was not the proper standard of review.

Petitioners offered two types of statistical evidence that was crucial to their attempt to prove disparate treatment in hiring: labor market evidence that purported to establish the racial composition of the available labor supply for the jobs at issue and "comparative statistics" that made a simple internal work force comparison between the percentage of

[6] Beyond the statistical evidence, it is significant to note that with a class of over 2,000 non-white employees, the petitioners were unable to establish a single instance of individual discrimination or disparate treatment in hiring, in application of hiring criteria, in treatment of applicants, in the rehire practice, in pay, in termination, in messing, in application of work rules and fraternization policies, or in housing.

minorities in jobs not at issue (cannery workers) with the percentage of minorities in at issue jobs. Respondents challenged the relevancy and accuracy of this statistical evidence and offered their own labor market theory and statistical comparisons. The district court rejected plaintiffs' labor market theory and statistics in favor of the evidence offered by respondents.[7] The district court also found that under the circumstances of this case, petitioners' comparative statistics were entitled to little weight and that defendants' labor market statistics were more persuasive. This decision was reasonable and therefore *cannot* be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573-4 (1985).

B. The District Court's Findings as to Statistical Evidence Under the Disparate Treatment Theory are Supported by Decisions of This Court and the Other Courts of Appeals.

More than ten years ago, this Court cautioned that the usefulness of statistics "depends on all the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977). Petitioners do not contest, but consistently ignore key factual findings that render their work force comparisons unpersuasive. For instance, the trial court found that respondents hired from an external labor market that was approximately 10% nonwhite; that they did not promote from within, nor did they provide the training for the at issue jobs; and that the racial composition of the cannery worker crews was severely distorted by institutional factors, particularly the dispatching practices of a union.

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[7] Petitioners did not challenge the rejection of their labor market theory in the Ninth Circuit nor do they challenge it here. They rely solely on the internal work force comparisons set forth in their "comparative statistics."

At least three post-*Hazelwood* circuit courts have held that simple internal work force comparisons such as petitioners rely on are relevant only in a promotion-from-within case or where the employer trains its workers for the jobs at issue. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 425 (5th Cir. 1980); *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 659-60 (4th Cir. 1983), *reversed on other grounds, sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). Petitioners do not refute, discuss, or even mention these decisions.

In determining whether minority employees are underrepresented in the at-issue jobs, it is an appropriate analysis to compare actual hiring with the racial composition of the relevant external labor market.[8] *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977) (alleged discrimination in hiring of teachers); *Johnson v. Transp. Agency*, 480 U.S.____, 94 L. Ed. 2d 615, 630-31 and n.10 (1987) (alleged "reverse" discrimination under affirmative action plan). The post-*Hazelwood* circuit court opinions agree. *E.g., Johnson v. Uncle Ben's, Inc., supra*, 628 F.2d at 425 (5th Cir. 1980); *Rivera v. City of Wichita Falls;* 665 F.2d 531, 544-45 (5th Cir. 1982); *DeMedina v. Reinhardt*, 686 F.2d 997, 1004-1009 (D.C. Cir. 1982); *EEOC v. Federal Reserve Bank of Richmond, supra*, 698 F.2d at 658-62 (4th Cir.). *See Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 380 (1st Cir. 1980) (plaintiff's "concentration evidence" rebutted by outside labor force statistics); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982) any showing of disparate impact in hiring refuted by external labor market

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[8] The purpose of the labor market analysis in an external hiring case is to establish the most reasonable "proxy" for the pool of qualified, available applicants for the jobs at issue. *E.g., Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482-83 (9th Cir. 1983). The trial court here found that the cannery workers were *not* a reasonable proxy. Petitioners' Appendix, p. A-249.

statistics). *Cf. Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (improper to adopt affirmative action plan for minorities where those minorities are not underrepresented in comparison to the external labor market); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1038-40 (7th Cir. 1987) (same; comparison of employer's work force to general *population*, rather than to relevant qualified labor supply is inappropriate when deciding whether to adopt an affirmative action plan).

More importantly, at least four post-*Hazelwood* circuit decisions hold that internal work force comparison statistics in a hiring case will be refuted by credible external labor market evidence that shows no underrepresentation of minorities in jobs at issue. *Hilton, supra*, 624 F.2d at 380 (1st Cir.); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *EEOC v. Federal Reserve Bank of Richmond, supra*, 698 F.2d at 658-62 (4th Cir.); *Rivera, supra*, 665 F.2d at 539, 544-45 (5th Cir.) *See Clark, supra*, 673 F.2d at 929 (7th Cir.) (external labor market data relied on to show no disparate impact in hiring). These decisions directly support the trial court's resolution of conflicting statistical evidence under the facts and circumstances present.[9]

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[9] In affirming these findings under the treatment analysis, the Ninth Circuit did not discuss respondents' labor market evidence. Moreover, it did not explain why it failed to discuss or credit respondents' labor market evidence under the *impact* theory; nor did it explain why petitioners' comparative statistics, discredited under the treatment theory, were any more probative under the *impact* theory. This is a subject of the Petition for Writ of Certiorari that respondents have filed. No. 87-1387 (February 9, 1988).

C. The Purported Conflict Between the Ninth Circuit's Decision on the Treatment Analysis and Decisions of This Court and Other Circuits is Nonexistent.

Petitioners' hiring statistics showed only that there is a higher percentage of class members in the cannery worker jobs than in the at-issue jobs. They claim that this alone proves unlawful "segregation." Petition, p. 5. Essentially, they claim that this evidence of imbalance cannot be rebutted; that it shows *per se* discrimination. *Id.*, pp. 5-6. None of the decisions cited by petitioners stand for this proposition and all of them are factually distinguishable. *See Id.*, pp. 6-8.

The portion of the *Teamsters* decision cited by petitioners[10] does not apply to the facts here. In *Teamsters*, the employer had two jobs (city driver and line driver) that were essentially fungible because the skills were "fairly readily acquirable" on the job and other qualifications were the same. *See Hazelwood, supra*, 433 U.S. at 308, n.13. The employer "allocated" the jobs amongst competing applicants and placed most minority workers in the lower-paying city driver job.

In contrast, here the jobs were found to be not fungible, *i.e.*, each job requires differing skills and qualifications. *See* Petitioners' Appendix, p. A-245. Additionally, the trial court found that the high percentage of minority employees in the cannery worker jobs was attributable to institutional factors, primarily the dispatching practices of the cannery worker union. Petitioners' Appendix, p. A-245-248; A-252; A-322. Finally, while in *Teamsters* the minority employees were "overwhelmingly excluded" from the jobs at issue (line driver), 431 U.S. at 342, n. 23, just the opposite was true here. The district court found that minorities were not significantly underrepresented in the jobs at issue. Petitioners' Appendix, p. A-252-253. Plaintiffs do not challenge this finding.

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[10] Petition, pp. 6-7; *Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

Petitioners cite two other decisions of this Court as support for their arguments that racial imbalance constitutes unlawful segregation and that labor market statistics are irrelevant. Petition, p. 7. The language cited in *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 579 (1978) is taken out of context. *See* Petition, p. 7. The statement was made in the course of rejecting the employer's argument that an *individual* claim of discrimination was refuted by a proportionate representation of the class in the employer's work force. Respondents make no such argument here.

Similarly inapposite is the citation to *Connecticut v. Teal*, 457 U.S. 440 (1982). *See* Petition, p. 7. In *Teal*, this Court held that if minorities are disproportionately excluded at one stage of a testing procedure, the fact that they are proportionately represented overall does not rebut a showing of disparate impact. Here, the trial court found that minorities were *not* significantly underrepresented in the jobs at issue and petitioners offered no evidence that they were disproportionately excluded at any stage of the hiring process.

Neither *Furnco* nor *Teal* stand for the proposition that racial imbalance between two groups of jobs is illegal segregation, that it was error to give relatively little weight to petitioners' internal work force comparisons, or that respondents' external labor market statistics are irrelevant. Moreover, if petitioners were correct, one would be forced to conclude that *Hazelwood* was overruled by *Furnco* and *Teal*. This is obviously not the case. *See Johnson, supra*, 94 L. Ed. 2d at 630-31 (citing *Hazelwood* with approval).

Placed in their proper factual contexts, the circuit court opinions petitioners cite do not support their argument. The quotation from *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 341 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), is illustrative. *See* Petition, p. 7. As that decision was explained by the Fifth Circuit in *Rivera, supra*, 665 F.2d at 541, n.16,

internal comparative statistics can be used in a promotion-from-within case where the company fills the upper positions through promotion of entry-level employees who are trained by the company in skills for the upper jobs. Those were the facts in *Stockham Valves*, 559 F.2d at 317, 340-41. They are not the facts here.

The *Payne* decision[11] simply held that the district court's decision to credit plaintiff's applicant flow statistics over defendant's hiring area statistics was not clearly erroneous. 673 F.2d at 823. Here, petitioners did not offer applicant flow statistics; they offered only internal work force comparisons which were found to be less probative.[12]

The *Paxton* decision[13] rejected the employer's hiring area statistics because the employer had a policy of promoting from within. 688 F.2d at 564. Respondents do not dispute that external labor market statistics are less relevant than internal work force comparisons on those facts. However, petitioners refuse to accept the obverse of this proposition: because the statistical comparison must fit the facts of the case, if hiring is from an external labor market, internal work force comparisons have little relevance. *E.g.*, *Rivera*, *supra*, 665 F.2d at 540-46 (relied on by *Paxton*, 688 F.2d at 564).

Petitioners' final contention is that respondents *should have* promoted cannery workers from within (and, presumably, trained workers for at-issue jobs). They claim that failure to promote is illegal, citing *Giles v. Ireland*, 742 F.2d 1366, 1381

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[11] *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982).

[12] It is interesting to note that in *Payne*, the Fifth Circuit *rejected* similar "bare work force statistics" on plaintiff's claim of discrimination in initial assignments. 673 F.2d at 824-25.

[13] *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563-64 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

(11th Cir. 1984). Petition, p. 8. Petitioners read too much into *Giles*. The employer had been previously found guilty of discrimination in segregating jobs. *Id.* at 1369. Past and court-ordered remedial hiring resulted in blacks being concentrated in the entry level positions. *Id.* at 1370, 1380. The employer, who had previously used these positions as a promotion pool for higher ranking jobs (*id.* at 1369), then changed its policy. It refused to promote any entry level workers. As a result, a disproportionate number of blacks were "frozen" into that position.[14] *Id.* at p. 1380.

The facts are much different here. There is no prior finding of discrimination; respondents have never had a promotion-from-within system; there is no evidence of pretext in that business decision; and since at issue jobs are not filled from within, no cannery worker is locked into that job. Each is free to seek work in the at-issue jobs each season. The district court found class members were not deterred from applying and that all applicants are treated equally. Petitioners' Appendix, pp. A-336; A-242.

Under these circumstances, no court has found an employer guilty of discrimination for failure to promote from within and no court has mandated adoption of a previously non-existent promotion policy. Yet petitioners demand it. This is an unjustified intrusion into the employer's business decisions in violation of this court's admonitions in *Furnco, supra*, 438 U.S. at 577-78 and in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

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[14] There was also evidence in *Giles* that the decision to no longer promote from within was pretextual. The employer stated that it had no need to fill the higher positions, but the evidence was to the contrary. 742 F.2d at 1370, 1376.

II. The Dismissal of Title VII Claims Against Columbia Wards Fisheries Canneries Was Correct Under Principles of Law of the Case and Waiver, and, if Reversed, Would Not Change the Result in This Case.

It was not until *after* the dismissal of Title VII claims against the Columbia Wards Fisheries facilities was affirmed by the Ninth Circuit that petitioners raised the theory they now assert.[15] Refusal to allow them to change their theory is a straight forward application of the principles of law of the case and waiver. It is not a matter of national importance.

Briefly the procedural history is as follows:

In March 1974, petitioners filed suit alleging violations of Title VII against three different employers. One of those employers was a joint venture, Columbia Wards Fisheries ("CWF"), that operated two of the five class canneries, Alitak and Ekuk. *See* Petitioners' Appendix, p. A-347 (definition of class).

In 1975, the Title VII claims against the CWF facilities were dismissed as based on untimely EEOC charges. Petitioners filed an initial 1975 appeal that was aborted[16] and then pursued a series of trial court motions over the next seven years attempting to revive these claims. In 1981, they again appealed. The Ninth Circuit affirmed the dismissal of the Title VII charges against the CWF canneries. 703 F.2d 329, 332 (9th Cir. 1982).

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[15] Petitioners contend that the dismissal of Title VII charges against the Columbia Wards Fisheries joint venture is of absolutely no consequence because each of the joint venturers was separately liable under Title VII for the acts of the joint venture.

[16] Plaintiffs voluntarily dismissed that 1975 appeal with a stipulation that the appeal could be made later.

It was not until after this 1982 affirmance that petitioners raised their theory of separate joint venturer liability. Both the trial court and the Ninth Circuit refused to allow petitioners to pursue this new theory. *See* Petitioners' Appendix, pp. A-147-149 (trial court); A-147-149 (Ninth Circuit panel opinion, adopted by reference by the panel on remand, A-49-50).

Petitioners now claim they could have raised their theory earlier and should not be barred by the previous appellate decisions.

> An appellant who has two possible grounds for appeal and presents only one to the appellate court is precluded from raising the other ground later in the case, even if it is successful in its first appeal.

Raxton Corp. v. Anania Assoc., Inc. 668 F.2d 622, 624 (1st Cir. 1982). In *Raxton*, the plaintiffs were barred from raising a new theory of liability on a second appeal. 668 F.2d at 625. The court stated the philosophy and policy behind its ruling:

> The presentation on appeal of all viable justifications of a judgment insures that simpler and speedier bases for decision are not overlooked, that occasions for remand are minimized, and that issues that may have appeared as independent alternatives to a trial court can be considered as mutually supporting in their dependent parts of an appellate decision.

668 F.2d at 624. *Accord, Richardson v. Communications Workers of Am., AFL-CIO,* 486 F.2d 801, 803-804 (8th Cir. 1973) (two union defendants found liable as a *unit* could not raise a new claim on a *second* appeal that they should have been treated as *separate* entities). The authorities petitioners cite are not to the contrary.

Finally, this petition should be denied because revival of the Title VII claims against the CWF canneries would not make a difference. Petitioners failed to prove Title VII liability under either the disparate treatment or disparate impact theories as to the actions at the CWF canneries. The finding of no intentional discrimination under the disparate treatment theory against all defendants was not clearly erroneous and was correctly affirmed by the Ninth Circuit. *See* discussion, *supra*, ¶ I. Petitioners' disparate impact case against respondents, including CWF, was based on the same comparative internal work force statistics that were discredited by the trial court in relation to petitioners' treatment claim. *Id.* As discussed at length in respondents' Petition for Writ of Certiorari (No. 87-1387, pp. 8-23), under a proper application of the disparate impact theory, petitioners also failed to prove their case under that theory.

CONCLUSION

The trial court's resolution of conflicting statistical evidence was not clearly erroneous and was supported by decisions of this court and the circuit courts. The dismissal of Title VII charges as to the CWF facilities is supported by circuit court opinions grounded in principles of law of the case and waiver. It is not in conflict with decisions of this court or other circuits. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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